

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DENNIS MORAN and MWW, PLLC,

Plaintiffs,

v.

MONITOR LIABILITY MANAGERS, LLC;
CAROLINA CASUALTY INSURANCE
COMPANY; PAUL FOGARTY and JANE
DOE FOGARTY, husband and wife and their
marital community formed thereof; and
DEARMIN FOGARTY PLLC,

Defendants.

No. C12-01656L

ORDER GRANTING PLAINTIFFS'
MOTION FOR REMAND

This matter comes before the Court on plaintiffs' "Motion to Remand." Dkt. # 10. Defendants Monitor Liability Managers, LLC (hereinafter "Monitor") and Carolina Casualty Insurance Company (hereinafter "Carolina") removed this action to federal court following the state court's dismissal of the only non-diverse defendants: Paul Fogarty, his firm, and his wife (hereinafter "Fogarty defendants"). Monitor and Carolina contend that the Fogarty defendants were fraudulently joined and that plaintiffs' voluntary dismissal of certain claims makes removal proper. The Court disagrees and grants plaintiffs' motion for remand.

It is well settled that removal statutes are strictly construed against removal and that the defendant has the burden of establishing that removal is proper. Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992). Any doubts regarding the propriety of removal favor remanding the case. Id. The Court finds that Carolina and Monitor have not met their burden for several reasons.

1 First, Defendants' removal of this action immediately after the Fogarty defendants were
 2 dismissed deprived plaintiffs of their normal options for seeking reconsideration of the decision,
 3 amendment of the complaint, or appellate review in the state courts. Plaintiffs and this Court are
 4 therefore faced with a situation where the decision that created complete diversity for federal
 5 jurisdiction purposes was made by a tribunal other than the one now hearing the case. The
 6 appropriate avenue for obtaining relief from the crucial decision was obscured by the mid-
 7 litigation shift in venue.

8 It is this sort of procedural ambiguity and potential for conflict that is avoided through the
 9 application of the voluntary/involuntary rule. As discussed by the Supreme Court and adopted by
 10 the Ninth Circuit:

11 It is also settled that a case, arising under the law of the United
 12 States, nonremovable on the complaint when commenced, cannot
 13 be converted into a removable one by evidence of the defendant or
 14 by an order of the court upon any issue tried upon the merits, but
 15 that such conversion can only be accomplished by the voluntary
 amendment of his pleadings by the plaintiff or, where the case is
 not removable because of joinder of defendants, by the voluntary
 dismissal or nonsuit by him of a party or of parties defendant.

16 Self v. General Motors Corp., 588 F.2d 655, 659 (9th Cir. 1978) (citing Kansas City Suburban
 17 Ry. Co. v. Herman, 187 U.S. 63 (1902)).

18 Defendants acknowledge this voluntary/involuntary rule and argue that "it was not the
 19 state court's dismissal of the claims against the Fogarty defendants that provided the impetus for
 20 removal, it was plaintiffs' voluntary concession" in oral argument that one of the claims¹ against
 21 the Fogarty defendants was "meritless and ripe for 12(b)(6) dismissal." Response, at 4. The Court
 22 disagrees. Defendants offer no authority for the proposition that a plaintiff's voluntary dismissal
 23 of a *claim* qualifies under the voluntary/involuntary rule. Rather, the key focus under Self is
 24 _____

25 ¹ The claim in question is a bad faith claim, which plaintiffs dispute that they ever alleged
 26 against the Fogarty defendants. For purposes of this argument, the Court need not decide whether
 plaintiffs in fact brought the charge and then abandoned it.

1 whether the plaintiff voluntarily dismissed a defendant *party*. The state court's dismissal of the
2 Fogarty defendants is the type of involuntary action that defeats removal.

3 Next, Monitor and Carolina argue that this voluntary/involuntary rule is subject to an
4 exception where the nondiverse defendants are determined to have been fraudulently joined.
5 Self, 588 F.2d at 659. In order to successfully demonstrate fraudulent joinder, Monitor and
6 Carolina must show that the removal action was timely, 28 U.S.C. § 1446(b), and that the
7 plaintiffs obviously failed to establish a cause of action against the Fogarty defendants according
8 to the settled rules of the state, Morris v. Princess Cruises, Inc., 236 F.3d 1061, 1067 (9th Cir.
9 2001).

10 As regards timeliness, defendants are required to remove within thirty days of service, 28
11 U.S.C. § 1446(b)(1), or "if the case stated in the initial pleadings is not removable, a notice of
12 removal may be filed within thirty days . . . from which it may first be ascertained that the
13 case . . . has become removable," id. § 1446(b)(3). Carolina and Monitor were served with
14 plaintiffs' complaint on June 14, 2012, but did not remove the action to federal court until
15 September 25, 2012, more than two months after the initial thirty-day clock had run. Faced with
16 this timing problem, Carolina and Monitor argue that the Fogarty defendants were initially
17 joined legitimately, and it was not until the plaintiffs dropped their only legitimate claim in oral
18 argument on September 7, 2012, that the Fogarty defendants became fraudulently joined. The
19 Court finds this argument unpersuasive, and defendants offer no authority to support their
20 argument that a defendant can become fraudulently joined in this manner. Accordingly, the
21 Court finds that the thirty-day removal period was not reset on September 7, 2012, and that
22 removal was untimely.

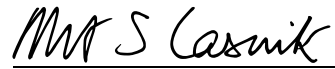
23 Additionally, Carolina and Monitor have not shown that the plaintiffs obviously failed to
24 establish a cause of action against the Fogarty defendants according to the settled law of the
25 state. Morris v. Princess Cruises, Inc., 236 F.3d 1061, 1067 (9th Cir. 2001). Although the
26 Fogarty defendants were dismissed by the state court trial judge, the dismissal does not resolve

1 issues of law in either party's favor, and a federal court considering fraudulent joinder is not
2 bound by the state trial court's dismissal. Poulos v. Naas Foods, Inc., 959 F.2d 69, 73 n.4 (7th
3 Cir. 1992). Instead, a district court should construe all doubts of law in favor of the plaintiff for
4 purposes of removal. Id. at 73.

5 Turning to plaintiffs' claim against the Fogarty defendants for tortious interference with a
6 contract, the Court agrees that this claim is not obviously foreclosed under Washington State
7 law. At issue is whether Mr. Fogarty, as outside coverage counsel for Carolina, can
8 independently interfere in the insurance contract between Carolina and plaintiffs. Defendants
9 cite to this Court's decision in Kazia Digo, Inc. v. Smart Circle Int'l, LLC, No. C11-544RSL,
10 2012 WL 836233 (W.D. Wash. Mar. 12, 2012), for the proposition that tortious interference
11 requires that the interferor be an intermeddling third party, not a party to the contract or its agent.
12 Carolina and Monitor overstate the Court's ruling. This Court did not decide in Kazia Digo
13 whether an agent of a contracting party can interfere with the contract. Moreover, the
14 Washington case cited by defendants leaves open the possibility that the Fogarty defendants
15 could be liable for tortious interference if Mr. Fogarty acted outside the scope of his assignment
16 from Carolina. Houser v. City of Redmond, 586 P.2d 482, 485 (1978) (noting that if "the actions
17 of the employees were not within the scope of employment, then they are third parties
18 potentially liable [for tortious interference] in their individual capacities"). Carolina and Monitor
19 have not shown that plaintiffs obviously failed to state a cause of action against the Fogarty
20 defendants.

21 For all of the foregoing reasons, the removal of this action to federal court was
22 inappropriate and plaintiff's motion to remand is GRANTED. The Clerk of Court is directed to
23 transmit the file regarding C12-01656RSL to the Superior Court of the State of Washington in
24 and for the County of King.
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2 DATED this 7th day of December, 2012.
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7 Robert S. Lasnik
8 United States District Judge
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